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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JUDITH S. WILSON, et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent. SOUTHERN CALIFORNIA MARINE ASSOCIATION, Real Party in Interest.	B198052 (Los Angeles County Super. Ct. No. NC039272)

ORIGINAL PROCEEDINGS; petition for extraordinary writ. Joseph E. Di Loreto, Judge. Petition granted.

Jacque Beugelmans and Duke L. Peters for Petitioners Judith S. and Roger C. Wilson.

Gilbert, Kelly, Crowley & Jennett, James P. Spaltro and Warren S. Fujimoto for Real Party In Interest.

No appearance on behalf of Respondent.

Petitioners Judith and Roger Wilson claim damages for Judith Wilson falling off a golf cart shuttle at a boat show. They seek an extraordinary writ of mandate directing the respondent court to vacate its order striking from their complaint allegations that Real Party in Interest, the Southern California Marine Association (Marine Association), acted as a common carrier, giving the utmost care and diligence to its passengers. We hold that the respondent court erred by striking the allegations that the Marine Association was acting as a common carrier.

FACTS AND PROCEDURAL HISTORY

According to the allegations of their complaint, Judith and Roger Wilson attended a boat show put on by the Marine Association at the Long Beach convention center. The Marine Association provided golf carts to shuttle "members of the public" from the parking lot to the hall where the boat show was taking place. When it was the Wilsons' turn to ride on the golf cart, the driver began accelerating before Judith was settled, causing her to fall off the cart and sustain unspecified injuries. There is also an allegation that the seat of the cart was angled downward and was covered in a slippery vinyl substance.

The Wilsons filed a personal injury suit against the Marine Association. They included allegations that the Marine Association acted as a common carrier in providing golf cart rides, requiring it to act with utmost care and diligence toward its passengers. The Marine Association filed a motion to strike the common carrier allegations, arguing they were irrelevant and false and not in conformity with state law because, inter alia, the allegations are not supported by the facts alleged in that complaint. The Marine Association stated, "The debate herein is purely legal, and centers on whether those circumstances make defendant a common carrier under the law. The issue can and should be decided as a matter of law, whether via the present motion or a subsequent motion for summary adjudication. As a matter of law, defendant was not a common carrier based on the allegations of the complaint." The trial court granted the motion stating, "This was not something offered to everyone, no charge for it. They didn't

operate in any particular location. [¶] I think this was more of a convenience of people wanting to go to the show . . . ." Thus, the trial court granted the motion to strike without prejudice to reinstatement of the allegations "if, during the course of discovery something more than [a] casual or occasional undertaking" were shown to have occurred.

This petition followed. The Wilsons argued that the Marine Association can, in fact, be considered a common carrier. They further objected to the trial court's reaching the factual conclusion that the Marine Association was not engaging in a regular business activity that might subject it to common carrier liability.[1] We issued an alternative writ of mandate directing the trial court to vacate its order granting the motion to strike. The trial court, however, chose not to comply with that alternative writ.

STANDARD OF REVIEW

In reviewing a trial court's determination on a motion to strike made pursuant to Code of Civil Procedure section 436, we apply the abuse of discretion standard. (Code Civ. Proc., § 436; *CLD Construction, Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1145.) Striking a provision in a pleading that, in effect, tests the legal sufficiency of an allegation, requires the appellate court to determine the legal sufficiency of the allegation de novo. (*Quiroz v. Seventh Avenue Center* (2006) 140 Cal.App.4th 1256, 1276-1277, 1276, fn. 25.)

When considering a motion to strike portions of a complaint, the trial court must accept the allegations of the complaint as true. (*Dawes v. Superior Court* (1980) 111 Cal.App.3d 82, 91.) The allegations are to be read in the context of the pleading as a whole. (*Courtesy Ambulance Service v. Superior Court* (1992) 8 Cal.App.4th 1504, 1519.) And, the allegations must be construed liberally with leave to amend granted to permit cure of any defects. (Code Civ. Proc., § 452; *CLD Construction, Inc. v. City of San Ramon*, *supra*, 120 Cal.App.4th at p. 1146.) Unless judicial notice is taken of

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[1] In its return to the petition, the Marine Association asserts that the Wilsons did not raise this argument before the trial court. That assertion is contradicted by the record.

appropriate facts found outside the four corners of the pleading, nothing outside the allegations of the complaint may be considered. (Code Civ. Proc., § 437, subd. (a).)

DISCUSSION

The Wilsons alleged that the Marine Association staged a boat show, and offered golf cart rides to the convention center where the show was held to members of the public. Accordingly, they alleged, the Marine Association was acting as a common carrier. Based on the allegations of the complaint, the trial court could not determine as a matter of law that the Marine Association was not acting as a common carrier.

"The significance of whether [Marine Association] is a common carrier is the standard of care imposed on it. In ordinary negligence cases, the duty is that of ordinary care which a reasonable, prudent person would use considering all the circumstances. [Citations.] As to common carrier, Civil Code section 2100 provides: 'A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.'" (*Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal.App.4th 1499, 1506-1507; see also *Gomez v. Superior Court* (2005) 35 Cal.4th 1125, 1130; *Brignoli v. Seaboard Transportation Co.* (1947) 29 Cal.2d 782, 791 ["the characteristics of the relationship of a common carrier and that of a contract or private carrier were of vital importance"].) Whether the device or vehicle is a common carrier or private carrier "is primarily a question of fact in each case." (*Haynes v. MacFarlane* (1929) 207 Cal. 529, 532; see *Brignoli v. Seaboard Transportation Co.*, *supra*, 29 Cal.2d at p. 792; *People v. Duntley* (1932) 217 Cal. 150, 165.)

A common carrier is defined as "[e]very one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages. . . ." (Civ. Code, § 2168.) That there is no allegation that petitioners were charged for the ride is not determinative. Stores that operate elevators and escalators for patrons have been held to be common carriers. (See *Squaw Valley Ski Corp. v. Superior Court*, *supra*, 2 Cal.App.4th at p. 1508.) "Although a store does not charge for the use of its elevators or

escalators, it profits from the utilization of these devices to assist customers in shopping at the store." (*Ibid.*) The Marine Association's argues that it only offers the service to patrons. But that fact still makes it no different from many facilities that provide services to patrons and are deemed common carriers. As our Supreme Court has noted, courts have given an expansive definition of carriers of persons for reward." (*Gomez v. Superior Court, supra*, 35 Cal.4th at p. 1131.) The court added that "California law has consistently defined broadly the term 'carrier of persons for reward (§§ 2100, 2101), and included within that definition amusement park rides like roller coasters, and other recreational forms of carriage.'" (*Id.* at p. 1133.)

The Marine Association relies on *Gradus v. Hanson Aviation, Inc.* (1984) 158 Cal.App.3d 1038. In that case, the court approved a jury instruction for the issue of whether the defendant was a common carrier, stating: "[Y]ou may consider any of the following factors: Whether it maintained a regular place of business for the purpose of carrying those who applied. . . ." (*Id.* at p. 1048) But this was just a factor to consider; not necessarily a conclusive factor. That the golf cart rides were a "convenience" for patrons at no charge for "casual or occasional undertaking," as stated by the trial court, may be factors to consider, but are not determinative of the issue. Accordingly, petitioners should have the opportunity to prove that the Marine Association was a common carrier for purposes of this case.

The Marine Association urges that petitioners have not pleaded sufficient facts and merely allege a conclusion that it was a common carrier. Yet, the trial court did not strike the allegations on that basis. Instead, it made an erroneous factual determination that the Marine Association was not acting as a common carrier. Petitioners alleged that the Marine Association held the boat show, offered to members of the public transportation to and from the Convention Center by means of electric powered golf carts, and, as a result, the Marine Association was a common carrier. As noted, whether a party acts as a common carrier is a question of fact. To plead that a party has acted as a common carrier is an appropriate allegation of an ultimate fact, especially when, as here, it follows from factual allegations suggesting the elements of common carrier status in this case. (See 4

Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 339, pp. 436-438; Civ. Code, § 2100; e.g. *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 784-785, 796; *Squaw Valley Ski Corp. v. Superior Court*, *supra*, 2 Cal.App.4th at p. 1508; *Rogoff v. Grabowski* (1988) 200 Cal.App.3d 624, 633-634.) The common carrier allegations did not amount to an unsupported legal conclusion that warranted an order striking them. (See *Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6-7.) Here, the allegations meet the test that they apprise the adversary of the factual basis of the claim. (4 Witkin, Cal. Procedure, *supra*, Pleading, § 339 at p. 438.)

The Marine Association argues that the Wilsons have an adequate remedy at law because the trial court permitted them to resurrect their common carrier allegations should discovery reveal facts supporting such a theory. But, requiring plaintiffs to produce proof of their common carrier theory before allowing them to assert it, effectively conditioning leave to amend upon production of proof, does not offer them an adequate remedy.

DISPOSITION

The petition for writ of mandate is granted. The respondent court is directed to vacate its order of March 15, 2007 granting the Marine Association's motion to strike, and enter a new and different order denying that motion. Petitioners are awarded their costs in this proceeding.

MOSK, J.

We concur:

TURNER, P.J.

ARMSTRONG, J.